Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 3)

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(F)-20 OF 2009(W) (NO 3)
ZULKEFLI, GOPAL SRI RAM AND ABDULL HAMID EMBONG FCJJ
26 NOVEMBER 2009

Civil Procedure — Costs — Oral application that non-party to suit be directed to pay costs out of his own pocket — Whether court has power to direct non-party to pay costs — Whether non-party warned at earliest opportunity of possibility that application for costs would be made against him

Civil Procedure — Stay of execution of judgment — Application for — Pending application for review under r 137 of the Rules of the Federal Court 1995 — Whether court had power to hear and grant stay of judgment under s 80 of the Courts of Judicature Act 1964 — Whether there can be stay of declaratory decree — Whether there were merits in review application — Courts of Judicature Act 1964 ss 44 & 88

The appellant, a Japanese citizen, and the first respondent were business partners in a restaurant. They decided to acquire the shop house ('the property') in which they operated their restaurant business. Upon acquiring the property, the first respondent sought to retain it for her own benefit and sold the property to the second respondent company. The appellant then commenced an action against the first respondent to establish that she was the beneficial owner of the property of which the second respondent was the registered proprietor. The appellant's claim that a trust had arisen in her favour was dismissed by the High Court but this court allowed the appellant's appeal reversing the judgments of the courts below and holding that the appellant was the beneficiary under a constructive trust which bound the conscience of the second respondent as trustee. Orders were accordingly made to protect the subject matter of the trust in specie. Thereafter it emerged that the subject matter of the trust had been sold off unilaterally by the second respondent and that it had pocketed the proceeds of the sale. This court then made a second judgment in the form of specific relief ('the second judgment') to give effect to the principal judgment of this court. The respondents now moved to stay execution of the orders made in the principal judgment and the second judgment on the grounds that they had applied for review under r 137 of the Rules of the Federal Court 1995 ('the review

application'). The respondents submitted that this court had the jurisdiction and power to hear this application and grant a stay pursuant to s 80 of the Courts of Judicature Act 1964 ('the CJA'). They argued that s 80 of the CJA should be construed widely to include post-judgment applications that seek a stay of execution pending the hearing of an application to review. The respondents further submitted that there were merits in the review application because this court had misconstrued s 433B of the National Land Code ('NLC') in its principal judgment and that the judgment was therefore per incuriam; and that the second judgment directing the second respondent to pay half the purchase price to the appellant's solicitors, to be held by them for their client, was a money judgment which cannot carry a penal notice, as it did in this case, so it stood to be set aside ex debito justitiae on the review application. At the hearing the appellant moved this court to order that Dato'Chong Yuet Hwa ('Chong'), the common law husband of the first respondent who was the alter ego of the second respondent company and the deponent of the affidavit in support of the application for a stay, be directed to pay the costs out of his own pocket. However, Chong argued that he was caught by surprise by the appellant's oral application and had not come prepared to meet the argument.

Held, dismissing the application for a stay with costs:

(1) Section 44 of the CJA which is in pari materia with s 80 of the CJA and confers similar power in the Court of Appeal had been interpreted as applying to cases where an appeal is pending before that court. Section 80 should be construed likewise. When viewed in its proper perspective, s 80 was designed to address a situation where there was either an application for leave to appeal or an appeal pending before this court. As such, s 80 of the CJA empowers this court to make interim preservation orders to protect the integrity of an appeal or a leave application until it is finally disposed of. Once an application for leave is refused or an appeal is finally disposed of by this court there was nothing left to preserve or protect. Thus, once an appeal was disposed of by this court there was no power to stay its effect and s 80 of the CJA did not confer such a power upon this court (see para 5).

(2) The principal judgment held that the appellant was a beneficiary under a constructive trust of which the second respondent was a trustee. In short it declared the existence of a constructive trust. There can be no committal or other execution process issued to enforce a declaration. Since a declaration cannot be enforced there was no question of staying a declaratory decree (see para 6)

(3) There was no need to enter into the merits of the appellant's submission that s 433B of the NLC had been misconstrued in the principal

judgment, as the court had no power to stay execution of the judgment. In any case r 137 cannot apply where a decision of this court was questioned, whether in law or on the facts of the case (see para 7).

(4) The appellant's argument that a money judgment cannot carry a penal notice and thus ought to be set aside could not stand. The appellant in the present case sought to enforce her beneficial interest under a constructive trust, which was a proprietary claim. It is trite that for so long as the proprietary claim attaches, equity acting in personam will seek out and restore the property or its product or substitute to the wronged beneficiary. In the present case, 'the original thing' was the building in which the partnership conducted its restaurant business. The 'product or substitute for the original thing' was the purchase price that the second respondent received when it sold off the 'original thing'. As such an order to disgorge trust property or the product or substitute thereof was not a money judgment (see paras 8, 12 & 13).

(5) It is settled law that a court had the power to direct a non-party such as Dato'Chong Yuet Hwa to pay the costs of any suit, appeal or other proceeding. However, as the non-party was not warned at the earliest opportunity of the possibility that such an application for costs would be made against him it would not be justice to make an order for costs against him personally (see para 18).

[Bahasa Malaysia summary

Perayu, seorang warga Jepun dan responden pertama merupakan rakan kongsi perniagaan dalam sebuah restoran. Mereka memutuskan untuk membeli rumah kedai ('hartanah') yang menjadi restoran mereka itu. Setelah membeli hartanah tersebut responden pertama ingin memilikinya bagi faedahnya sendiri dan menjual hartanah tersebut kepada responden kedua. Perayu kemudiannya memulakan tindakan terhadap responden pertama untuk membuktikan bahawa dia adalah pemilik benefisial hartanah tersebut yang mana responden kedua merupakan pemilik berdaftar. Tuntutan perayu bahawa satu amanah telah wujud bagi pihaknya ditolak oleh Mahkamah Tinggi tetapi mahkamah ini membenarkan rayuan perayu terhadap penghakiman-penghakiman Mahkamah Tinggi dan Mahkamah Rayuan dan memutuskan bahawa perayu merupakan pemilik benefisiari di bawah amanah konstruktif dan mengikat tanggungjawab responden kedua sebagai pemegang amanah. Perintah-perintah dibuat untuk melindungi hal perkara amanah tersebut in specie. Kemudiannya timbul pula perkara bahawa hal perkara amanah tersebut telah dijual oleh responden kedua dan ia telah mengambil keuntungan daripada hasil jualan tersebut sendirian. Mahkamah ini kemudiannya membuat penghakiman kedua dalam bentuk relief spesifik ('penghakiman kedua') bagi memberi kesan kepada penghakiman prinsipal

mahkamah ini. Responden-responden kini mengambil tindakan untuk menangguhkan pelaksanaan perintah-perintah yang telah dibuat dalam penghakiman prinsipal dan penghakiman kedua atas alasan-alasan bahawa mereka telah memohon untuk semakan di bawah k 137 Kaedah-Kaedah Mahkamah Persekutuan 1995 ('permohonan semakan'). Responden-responden menyatakan bahawa mahkamah ini mempunyai kuasa dan bidang kuasa untuk mendengar permohonan ini dan memberikan suatu penangguhan berikutan s 80 Akta Mahkamah Kehakiman 1964 ('AMK'). Mereka berhujah bahawa s 80 AMK harus ditafsirkan dengan meluas bagi memasukkan permohonan-permohonan selepas penghakiman bagi penangguhan pelaksanaan sementara menunggu pendengaran suatu permohonan semakan. Responden-responden seterusnya menyatakan bahawa terdapat merit dalam permohonan semakan tersebut disebabkan mahkamah ini telah salah tafsir s 433B Kanun Tanah Negara ('KTN') dalam penghakiman prinsipalnya dan bahawa penghakiman tersebut adalah per incuriam; dan bahawa penghakiman kedua mengarahkan responden kedua membayar separuh daripada harga belian kepada peguam cara-peguam cara perayu, dipegang bagi pihak klien mereka, merupakan penghakiman dalam bentuk wang, yang mana bukanlah notis hukuman, seperti yang berlaku dalam kes ini, maka harus diketepikan ex debito justitiae dalam permohonan semakan tersebut. Semasa pendengaran perayu memohon mahkamah untuk memerintahkan bahawa Dato' Chong Yuet Hwa ('Chong'), suami di bawah *common law* responden pertama yang merupakan personaliti kedua bagi syarikat responden kedua dan juga deponen afidavit sokongan bagi permohonan penangguhan tersebut, diarahkan membayar kos daripada poketnya sendiri. Tetapi Chong berhujah bahawa dia terkejut dengan permohonan lisan perayu itu dan tidak bersedia untuk menjawab hujahan tersebut.

Diputuskan, menolak permohonan penangguhan dengan kos:

(1) Seksyen 44 AMK yang pari materia dengan s 80 AMK dan memberi kuasa yang sama dalam Mahkamah Rayuan telah ditafsirkan sebagai boleh digunapakai kepada kes-kes di mana sedang menunggu rayuan di mahkamah tersebut. Seksyen 80 harus ditafsirkan sebegitu juga. Apabila dilihat daripada perspektif yang tepat, s 80 digubal untuk menangani situasi di mana terdapatnya permohonan untuk keizinan untuk merayu atau sementara menunggu rayuan di mahkamah ini. Oleh itu, s 80 AMK memberi kuasa kepada mahkamah ini untuk membuat perintah pemeliharaan interim bagi melindungi intergriti sesuatu rayuan atau permohonan keizinan sehinggalah diputuskan dengan muktamad. Apabila suatu permohonan untuk keizinan tidak diberikan atau suatu rayuan akhirnya diputuskan secara muktamad oleh mahkamah ini, maka tiada apa lagi yang boleh dipelihara atau dilindungi. Maka,

apabila suatu rayuan diputuskan dengan muktamad oleh mahkamah ini maka tiada kuasa untuk menangguhkan kesannya dan s 80 AMK tidak memberikan kuasa sebegitu kepada mahkamah ini (lihat perenggan 5).

(2) Penghakiman prinsipal memutuskan bahawa perayu merupakan benefisiari di bawah amanah konstruktif yang mana responden kedua merupakan pemegang amanah. Pendek kata, penghakiman itu mengisytiharkan bahawa kewujudan satu amanah konstruktif. Maka tidak boleh ada komital atau proses pelaksanaan yang lain dikeluarkan untuk melaksanakan suatu perisytiharan. Memandangkan suatu perisytiharan tidak boleh dilaksanakan maka tiada persoalan penangguhan dikri perisytiharan (lihat perenggan 6).

(3) Tidak perlu untuk melihat kepada merit hujahan perayu bahawa s 433B KTN telah disalah tafsirkan dalam penghakiman prinsipal kerana mahkamah tiada kuasa untuk menangguhkan pelaksanaan penghakiman tersebut. Walau apapun, k 137 tidak boleh digunapakai di mana keputusan mahkamah ini dipersoalkan, sama ada dari segi undang-undang atau fakta-fakta kes (lihat perenggan 7).

(4) Hujahan perayu bahawa penghakiman dalam bentuk wang tidak boleh menjadi notis hukuman dan oleh itu harus diketepikan tidak kukuh. Perayu dalam kes ini memohon untuk melaksanakan kepentingan benefisialnya di bawah amanah konstruktif, yang mana merupakan tuntutan berbentuk milikan hartanah. Adalah sudah tetap bahawa selagi tuntutan berbentuk milikan hartanah bersangkut paut, ekuiti, bertindak in personam akan memulangkan hartanah tersebut atau hasil keluarannya atau menggantikannya kepada benefisiari yang telah mengalami kerugian. Dalam kes ini, 'the original thing' merupakan bangunan di mana perkongsian tersebut menjalankan perniagaan restorannya. Manakala 'product or substitute for the original thing' merupakan harga belian yang diterima oleh responden kedua apabila dia menjualkan 'original thing'. Maka, suatu perintah untuk menyerahkan kembali hartanah amanah tersebut atau hasil pengeluarannya atau penggantiannya terhadapnya bukanlah penghakiman dalam bentuk wang (lihat perenggan 8, 12 & 13).

(5) Adalah menjadi undang-undang tetap bahawa mahkamah mempunyai kuasa untuk mengarahkan seseorang yang bukan pihak kepada sesuatu tindakan seperti Dato' Chong Yuet Hwa untuk membayar kos bagi apa-apa guaman, rayuan atau lain-lain prosiding. Walau bagaimanapun, memandangkan seseorang yang bukan pihak tersebut tidak diberikan peringatan pada peringkat awal tentang kemungkinan bahawa permohonan untuk kos akan dibuat terhadapnya, maka adalah tidak adil untuk membuat perintah tentang kos terhadapnya secara peribadi (lihat perenggan 18).]

Notes

For cases on application for stay of execution of judgment, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6423–6492.

For cases on costs in general, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1867–2239.

Cases referred to

Aiden Shipping Co Ltd v Interbulk Ltd [1986] AC 965, HL (refd)

Badan Peguam Negara v Kerajaan Malaysia [2009] 2 MLJ 161; [2009] 1 CLJ 833, FC (refd)

Banque Belge Pour L'etranger v Hambrouck & Ors [1921] 1 KB 321, CA (refd)

Foskett v McKeown & Ors [2000] 3 All ER 97, FC (refd)

H Leverton Ltd v Crawford off-Shore (Exploration) Service Ltd (in liquidation) (1996) The Times, November 22 (refd)

Prakash Chand v SS Grewal (1975) Cri LJ 679, HC (refd)

Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 2) [2010] 2 MLJ 181, FC (refd)

Taylor v Plumer (1815) 105 ER 721 (refd)

Tolhurst v Smith [1995] EMLR 176 (refd)

Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd (formerly known as Ekspedisi Ria Sdn Bhd) [2002] 4 MLJ 113, CA (refd)

Symphony Group Plc v Hodgson [1994] QB 179, CA (folld)

Legislation referred to

Courts of Judicature Act 1964 ss 44, 80

National Land Code s 433B

Rules of the Federal Court 1995 r 137

Appeal from: Civil Appeal No W-02–1236 of 2005 (Court of Appeal, Putrajaya)

Manjit Singh Saini (Harun Idris, Yeoh & Partners) for the appellant.

Wong Kian Kheong (Harjinder Kaur, Alex Tan and Abigail Lai with him) (Tay, Tee & Nasir) for the second respondent.

Gopal Sri Ram FCJ (delivering judgment of the court):

[1] This is an application to stay execution on the judgment of this court pending the outcome of an application by the second respondent to have this court review the principal judgment. The background to this application is as follows.

[2] On 16 October 2009, this court allowed the appellant's appeal, reversing the judgments of the courts below and holding that the appellant was the beneficiary under a constructive trust which bound the conscience of the second respondent as trustee. On 27 October 2009, orders were made to protect the subject matter of the trust in specie. On 13 November 2009, the court was advised that the subject matter of the trust had been sold off unilaterally by the second respondent and that it had pocketed the proceeds of the sale. An order in the form of specific relief was then made to give effect to the principal judgment of this court. The order that was made and the reasons for making it are set out in the second judgment issued in this appeal and dated 16 November 2009 (see *Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 2)* [2010] 2 MLJ 181).

[3] Today, that is to say, on 26 November 2009, we were moved to stay execution of the orders made both in the principal judgment and in the second judgment dated 16 November 2009 on the ground that an application for review under r 137 of the Rules of the Federal Court 1995 had been filed this morning. Two submissions were made in support of the application. First it was submitted by learned counsel for the second respondent that this court had jurisdiction and power to hear and determine this application and grant a stay pursuant to s 80 of the Courts of Judicature Act 1964 ('the Act'). That section reads as follows:

> (1) In any proceeding pending before the Federal Court any direction incidental thereto not involving the decision of the proceeding, any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding, any order for security for costs, and for the dismissal of a proceeding for default in furnishing security so ordered may at any time be made by a Judge of the Federal Court.
>
> (2) Every application under subsection (1) shall be deemed to be a proceeding in the Federal Court.
>
> (3) Every order made under subsection (1) may, upon application by the aggrieved party made within ten days after the order is served, be affirmed, varied or discharged by the Court.

[4] It was argued the section should be construed widely as to include post-judgment applications that seek a stay of execution pending the hearing of an application to review. No authority was cited in support of these submissions.

[5] It is to be noted that s 80 is in pari materia with s 44 of the Act, the latter conferring similar power in the Court of Appeal. The latter section has been interpreted as applying to cases where an appeal is pending before that

court. See *Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd (formerly known as Ekspedisi Ria Sdn Bhd)* [2002] 4 MLJ 113. In our judgment s 80 should be construed likewise. When viewed in its proper perspective, what s 80 is designed to address is a situation where there is either an application for leave to appeal or an appeal pending before this court the integrity of which is required to be preserved. It would be futile for an appellant or an intended appellant to prosecute his appeal or application for leave before this court if the subject matter of the appeal is dissipated or otherwise disposed of. Power is necessary in an appellate court, in particular the apex court, to preserve and maintain the status quo until the matter is finally disposed of. Section 80 does precisely that. It empowers us to make interim preservation orders to protect the integrity of an appeal or a leave application until it is finally disposed of. Once an application for leave is refused or an appeal is finally disposed of by this court, there is nothing left to protect or preserve. If the second respondent's argument is correct then an appellant who fails in his appeal will equally be entitled to ask for a stay pending a review. That proposition need only be stated to recognise its fallacy. Once an appeal is disposed of there is no power in this court to stay its effect. And s 80 certainly does not confer such a power upon us.

[6] There is an added point in so far as staying the effect of the principal judgment is concerned. All that judgment does, inter alia, is to hold that the appellant is a beneficiary under a constructive trust of which the second respondent is a trustee. In short it declares the existence of a constructive trust. It makes no positive order. The weakness of the remedy of declaration lies in the want of its enforceability. A declaration cannot be enforced by execution. In *Prakash Chand v SS Grewal* (1975) Cri LJ 679, the court held as follows:

> A declaratory decree cannot be executed as it only declares the rights of the decree-holder qua the judgement-debtor and does not, in terms, direct the judgement-debtor to do or to refrain from doing any particular act or things. Since there is no command issued to the judgement-debtor to obey, the civil process cannot be issued for the compliance of that mandate or command.

In other words, there can be no committal or other execution process issued to enforce a declaration. Since a declaration cannot be enforced, no question of staying it may arise.

[7] The second submission made by the appellant is that there are merits in the review application for two reasons. First, because this court in the principal judgment misconstrued s 433B of the National Land Code and the judgment is therefore per incuriam. Learned counsel argued that his client has a good chance of succeeding in the review of the earlier judgment delivered in this very case. Without entering upon the merits of counsel's

submission we find it sufficient to say that the conclusion reached that this court has no power to stay execution of the judgment does not require us to comment on this point. In any event, we think it is now clear that r 137 'cannot apply where a decision of this court is only questioned, whether in law or on the facts of the case' (*Badan Peguam Negara v Kerajaan Malaysia* [2009] 2 MLJ 161; [2009] 1 CLJ 833, per Zaki Tun Azmi Chief Justice).

[8] The second reason advanced by learned counsel is this. The order we made on 16 November 2009 directing the second defendant to make pay half the purchase price to the appellant's solicitors to be held by them for their client is a money judgment which cannot carry a penal notice as it does in this case. As we understand counsel, that order is liable to be set aside ex debito justitiae on his client's review application. With respect, we apprehend that learned counsel has misunderstood the nature of the case against his client. What the appellant sought is the enforcement of her beneficial interest under a constructive trust. Being a proprietary claim, she is entitled to trace her beneficial ownership in the property into the purchase price now in the hands of the second respondent. It is trite that for so long as a proprietary claim attaches, equity acting in personam will seek out and restore the property or its product or substitute to the wronged beneficiary subject of course to the well known exceptions already alluded to in the principal judgment. And we need do no more than to refer to *Banque Belge Pour L'etranger v Hambrouck & Ors* [1921] 1 KB 321 as authority for that proposition.

[9] The facts of that case will be notoriously familiar to any student of equity. Hambrouck worked for Pelabon who banked with the plaintiff bank. By fraud or forgery, Hambrouck drew monies of Pelabon's account with the plaintiff bank. He used these monies to pay his mistress, a Belgian lady called Spanoghe. She paid a portion of the monies into her bank. When the fraud was discovered, she had £315 in her account. The plaintiff bank sued to recover this money which it had been deprived of by Hambrouck's fraud. The claim was for money had and received and the bank sought to follow the money into Spanoghe's account. Her defence, inter alia, was that the money had passed through several hands and hence could not be identified as the plaintiff bank's money. However, it is important to note that the relief claimed by the bank was not for a money judgment. It was for an order that the money in the hands of Spanoghe's bank (which by that time had been paid into court) be paid out to the plaintiff. We may take up the rest from the judgment of Atkin LJ:

> In giving judgment however, the learned judge has treated the claim as one for money had and received, and the judgment entered is an ordinary judgment against the appellant on a money claim for £315 together with an order that the sum in court should be paid out to the plaintiffs in part satisfaction. *The two forms*

of relief are different, and though in this case there is no substantial difference in the result, the grounds upon which relief is based might have been material.

First, does it make any difference to the plaintiffs' rights that their money was paid into Farrow's Bank, and that the money representing it drawn out by Hambrouck was paid to the defendant Bank on deposit? If the question be the right of the plaintiffs in equity to follow their property, I apprehend that no difficulty arises. The case of *In re Hallett's Estate* 13 Ch D 696 makes it plain that the court will investigate a banking account into which another person's money has been wrongfully paid, and will impute all drawings out of the account in the first instance to the wrongdoer's own moneys, leaving the plaintiff's money intact so far as it remains in the account at all. There can be no difficulty in this case in following every change of form of the money in question, whether in the hands of Hambrouck or of the appellant, and it appears to me that the plaintiffs were, on the grounds alleged in the statement of claim, entitled to a specific order for the return of the money in question, and, as it is now represented by the sum in court, to payment out of court of that sum. (Emphasis added.)

[10] Atkin LJ then quoted the following observation of Lord Ellenborough in *Taylor v Plumer* (1815) 105 ER 721:

... the product of or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail, which is the case when the subject is turned into money, and mixed and confounded in a general mass of the same description.

[11] Atkin LJ then uttered these famous words:

But if in 1815 the common law halted outside the bankers' door, by 1879 equity had had the courage to lift the latch, walk in and examine the books: *In re Hallett's Estate*. I see no reason why the means of ascertainment so provided should not now be available both for common law and equity proceedings. If, following the principles laid down in *In re Hallett's Estate*, it can be ascertained either that the money in the bank, or the commodity which it has bought, is 'the product of, or substitute for, the original thing', then it still follows 'the nature of the thing itself'. On these principles it would follow that as the money paid into the bank can be identified as the product of the original money, the plaintiffs have the common law right to claim it, and can sue for money had and received.

[12] We conclude by saying that a most instructive modern application of the process of tracing trust property is to be found in *Foskett v McKeown & Ors* [2000] 3 All ER 97.

[13] In the present case, the original thing was the building in which the partnership conducted its restaurant business. The 'product or substitute for the original thing' is the purchase price that the second respondent received when it sold off 'the original thing' so that the trust impressed on the

immovable 'original thing' follows into the 'product or substitute' as it is 'the nature of the thing itself'. And as may be seen from the judgment of Atkin LJ quoted above, an order to disgorge trust property or the product or substitute thereof is not a money judgment.

[14] For these reasons the application was dismissed with costs which were fixed at RM25,000. Learned counsel for the appellant then moved us to order that Dato' Chong Yuet Hwa, the deponent of the affidavit in support of the application for a stay be directed to pay the costs out of his own pocket. This gentleman is the person found by the High Court to be the alter ego and sole directing mind and will of the second respondent. He is also the common law husband of the first respondent. Two questions arise: (i) whether it is permissible to order that the costs be paid by him and (ii) if the answer is in the affirmative, then, whether such an order should be made here.

[15] Dealing with the first question, it is now settled that a court has power to direct a non-party — and for present purposes Dato' Chong is a non-party — to pay the costs of any suit, appeal or other proceeding. This was established by the decision of the House of Lords in *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] AC 965. In *Symphony Group Plc v Hodgson* [1994] QB 179, the English Court of Appeal in the judgment of Balcombe LJ laid down the following guidelines for the making of a costs order against a non-party:

(1) An order for the payment of costs by a non-party will always be exceptional: see per Lord Goff in *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] AC 965 at pp 965 and 980F; the judge should treat any application for such an order with considerable caution;

(2) It will be even more exceptional for an order for the payment of costs to be made against a non-party, where the applicant has a cause of action against the non-party and could have joined him as a party to the original proceedings; joinder as a party to the proceedings gives the person concerned all the protection conferred by the rules, as to eg the framing of the issues by pleadings; discovery of documents and the opportunity to pay into court or to make a *Calderbank* offer (*Calderbank v Calderbank* [1976] Fam 93); and the knowledge of what the issues are before giving evidence;

(3) Even if the applicant can provide a good reason for not joining the non-party against whom he has a valid cause of action, he should warn the non-party at the earliest opportunity of the possibility that he may seek to apply for costs against him; at the very least this will give the non-party an opportunity to apply to be joined as a party to the action under O 15 r 6(2)(b)(i) or (ii); principles (2) and (3) require no further justification on my part; they are an obvious application of the basic principles of natural justice;

(4) An application for payment of costs by a non-party should normally be determined by the trial judge: see *Bahai v Rashidian & Anor* [1985] 1 WLR 1337;

(5) The fact that the trial judge may in the course of his judgment in the action have expressed views on the conduct of the non-party constitutes neither bias nor the appearance of bias; bias is the antithesis of the proper exercise of a judicial function: see *Bahai v Rashidian & Anor* [1985] 1 WLR 1337 at pp 1342H and 1346F;

(6) The procedure for the determination of costs is a summary procedure, not necessarily subject to all the rules that would apply in an action; thus, subject to any relevant statutory exceptions, judicial findings are inadmissible as evidence of the facts upon which they were based in proceedings between one of the parties to the original proceedings and a stranger: see *Hollington v F Hewthorn & Co Ltd & Anor* [1943] KB 587; *Cross on Evidence* (7th Ed), 1990 at pp 100–101 (yet in the summary procedure for the determination of the liability of a solicitor to pay the costs of an action to which he was not a party, the judge's findings of fact may be admissible: see *Brendon v Spiro* [1938] 1 KB 176 at p 192, cited with approval by this court in *Bahai v Rashidian & Anor* [1985] 1 WLR 1337 at pp 1343D and 1345H; this departure from basic principles can only be justified if the connection of the non-party with the original proceedings was so close that he will not suffer any injustice by allowing this exception to the general rule);

(7) Again, the normal rule is that witnesses in either civil or criminal proceedings enjoy immunity from any form of civil action in respect of evidence given during those proceedings; one reason for this immunity is so that witnesses may give their evidence fearlessly: see *Palmer & Anor v Durnford Ford (a firm) & Anor* [1992] QB 483 at p 487 (in so far as the evidence of a witness in proceedings may lead to an application for the costs of those proceedings against him or his company, it introduces yet another exception to a valuable general principle);

(8) The fact that an employee, or even a director or the managing director, of a company gives evidence in an action does not normally mean that the company is taking part in that action, in so far as that is an allegation relied upon by the party who applies for an order for costs against a non-party company: see *Gleeson v J Wippell & Co Ltd* [1977] 1 WLR 510 at p 513; and

(9) The judge should be alert to the possibility that an application against a non-party is motivated by resentment of an inability to obtain an effective order for costs against a legally aided litigant. The courts are well aware of the financial difficulties faced by parties who are facing legally aided litigants at first instance, where the opportunity of a claim

against the Legal Aid Board under s 18 of the Legal Aid Act 1988 is very limited. Nevertheless the Civil Legal Aid (General) Regulations 1989 (SI 1989 No 339/89), and in particular regs 67, 69 and 70, lay down conditions designed to ensure that there is no abuse of legal aid by a legally assisted person and these are designed to protect the other party to the litigation as well as the Legal Aid Fund. The court will be very reluctant to infer that solicitors to a legally aided party have failed to discharge their duties under the regulations — see *Orchard v South Eastern Electricity Board* [1987] QB 565 — and in my judgment this principle extends to a reluctance to infer that any maintenance by a non-party has occurred.

[16] On the issue whether a non-party would suffer prejudice if we ordered him or her to pay costs personally, we find two further authorities of assistance. The first is *H Leverton Ltd v Crawford off-Shore (Exploration) Service Ltd (in liquidation)* (1996) The Times, November 22. That was a case in which Garland J made an order of costs against Mr Christopher Richard Crawford, a non-party who was the sole directing mind and will of the defendant company and for all practical purposes the company itself. It was held that the making of such an order against Mr Crawford did no injustice to him because of his closeness to the proceedings. It is to be noted that in *Leverton* the order was sought after giving notice to the defendant.

[17] The other case is *Tolhurst v Smith* [1995] EMLR 176 where Chadwick J (later LJ) after dismissing an action brought by an individual plaintiff ordered costs against a company called Lawrence Tolhurst Music Co Ltd on the ground that the company was Mr Tolhurst's alter ego. But we notice from the report of that case that there an application by inter partes motion was made to Chadwick J seeking the special order as to costs.

[18] In the present case, learned counsel for the second respondent complains that he and indeed Dato Chong are caught by surprise by the appellant's oral application. He says that if adequate notice had been given, he would have come prepared to meet the argument advanced against him. In our judgment there is merit in this submission. If you look at the third guideline in the *Symphony*'s case, you will see that the successful party must 'warn the non-party at the earliest opportunity of the possibility that he may seek to apply for costs against him'. That did not happen here. It is not justice, no matter what the indignation one may feel at the conduct of Dato Chong, to make an order for costs against him personally in the present circumstances. The appellant's application in that behalf was accordingly refused.

[19] Before concluding, there is one matter of which mention must be made. During the hearing, on not less than three occasions, learned counsel for the second respondent was invited to consider making an oral application for an extension of time to comply with the order of 16 November 2009 which we were prepared to entertain. This rather generous offer was however declined in the second respondent's final submission.

Application for stay dismissed with costs.

Reported by Kohila Nesan